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Stephanos Bibas

University of Pennsylvania Carey Law School

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THE NEED FOR PROSECUTORIAL DISCRETION

by STEPHANOS BIBAS*

I. INTRODUCTION

When scholars discuss prosecutorial discretion, they often treat it as a regrettable concession to reality. American criminal court dockets are chronically congested, so prosecutors must use discretion to plea bargain away most of their cases.¹ Legislatures, as William Stuntz has argued, have strong political incentive to pass overbroad and overlapping criminal statutes instead of drawing them so narrowly that some scoundrels might escape.² Admittedly, these broad and overlapping criminal laws let police and prosecutors decide who actually deserves to be charged and with what crimes.³ For instance, police may ignore most automobile drivers who go over the sixty-five mile-per-hour speed limit, stopping only those who go at least eighty. Or they might pull over only black drivers as a pretext to search for drugs. For their part, prosecutors can decline to charge entirely, citing their workloads, and leave enforcement to potential civil suits.⁴ Or, prosecutors can charge crimes they would not normally pursue to trial as a way of racking up plea bargaining chips or pressing a small fry to cooperate against the big fish. Sentencing laws likewise give prosecutors enormous discretion to recommend high or low punishments, diversion to drug treatment, or deals in exchange for cooperation against other defendants.⁵ In a world of scarcity, prosecutors are the key gatekeepers who ration criminal justice.

Is prosecutorial discretion, then, simply a regrettable artifact of scarcity? If our dockets were spacious and our prisons capacious, would we do away with prosecutorial discretion entirely? No. True, even some modern countries with busy dockets abjure American-style prosecutorial discretion. In Germany and elsewhere in continental Europe, prosecutors are supposed to charge and prosecute all defendants for whom they have enough evidence of guilt.⁶ A few American states,

* Professor of Law and Criminology, University of Pennsylvania Law School.

1. MILTON HEUMANN, *PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS* 1 (U. Chi. Press 1978).

2. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 529-33 (2001) (explaining that legislators want to stay in office, requiring them to please their constituents, including prosecutors, resulting in gain when they write criminal statutes to benefit prosecutors).

3. *Id.* at 549.

4. *Id.* at 535.

5. See Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550, 550 (1978) (noting that prosecutors have a greater influence on sentencing than other governmental decision makers).

6. See Strafprozeßordnung [StPO] [Code of Criminal Procedure] Dec. 9, 1975, Bundesgesetzblatt [BGBl] 631, as amended, § 152(2) (requiring prosecutors to act against all crimes for which they have a

including West Virginia, purport to require prosecutors to pursue charges.⁷ And victims' rights advocates occasionally suggest that all victims should be able to bring cases when prosecutors do not, as a few states allow.⁸

While the press of business and the welter of statutes exacerbate the need for prosecutorial discretion, they do not create it. Even in a world of unlimited resources and sane criminal codes, discretion would be essential to doing justice. Justice requires not only rules but also fine-grained moral evaluations and distinctions. Judges and juries should make more of these judgment calls than they do now, but prosecutors also deserve large roles.

Consider an actual example that epitomizes the problems of law without prosecutorial discretion: a grandmother in Delaware sent her granddaughter to her third-grade class with a birthday cake and a knife with which to cut it.⁹ The teacher used the knife to cut and serve the cake, but then called the principal's office to report the girl for bringing a weapon to school.¹⁰ The school district had a zero-tolerance policy for weapons (to avoid accusations of discriminatory enforcement) so it had no choice but to expel the girl for a year.¹¹ After a public outcry, Delaware legislators passed a law giving administrators some case-by-case flexibility to modify expulsions from school.¹² The next year, Delaware first-grader Zachary Christie, excited about joining the Cub Scouts, brought his camping combination fork, spoon, and knife to use at lunch.¹³ Zachary had violated the school's zero-tolerance policy for weapons, so it had to suspend him for forty-five days.¹⁴ The board had no choice but to suspend Zachary, since the new law created flexibility only for expulsions.¹⁵ Because these rigid laws left too little room for enforcement discretion, they produced absurdly unjust results.

In this Symposium Essay, I want to distinguish discretion per se from idiosyncratic discretion. Discretion per se is neither bad nor antithetical to the rule of law. We often equate the rule of law with rigid rules, emphasizing the need to treat like cases alike. But the flip side of rigid rules is discretion in applying them where they do not quite fit. The flip side of treating like cases alike is treating unlike cases unlike. By their nature, rules cannot capture every subtlety, which is why various actors need discretion to tailor their application of the law. More of

sufficient factual basis): COSF. [Constitution] art. 112 (Italy) ("The public prosecutor has the duty to institute criminal proceedings.").

7. See W. VA. CODE ANN. § 7-4-1 (LEXISNEXIS 2009) (specifying that each county prosecutor, after receiving information of a crime in the county, "shall institute and prosecute all necessary and proper proceedings against the offender . . .").

8. See WIS. STAT. ANN. § 968.02(3) (West 2009) (allowing a private party, after court approval, to issue a criminal complaint if a district attorney is unavailable or refuses to do so); W. VA. CODE ANN. § 48-27-902 (authorizing court-approved private complaints for domestic violence).

9. Ian Urbina, *It's a Fork, It's a Spoon, It's a . . . Weapon? School Suspends Boy*, 6, N.Y. TIMES, Oct. 12, 2009, at A1, available at <http://www.nytimes.com/2009/10/12/education/12discipline.html>.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

that discretion should reside in the hands of police, judges, juries, and pardon authorities. But much of it rightly belongs to prosecutors. What we should fear is not prosecutorial discretion but idiosyncratic prosecutorial discretion. We rightly fear that justice will vary from prosecutor to prosecutor, with each one a law unto himself and his own whims, biases, and shirking. The solution, then, is to create a culture, structures, and incentives within prosecutors' offices so that prosecutors use their discretion consistently and in accord with the public's sense of justice. In moderation, judicious discretion promotes justice; promiscuous, idiosyncratic discretion violates it.

II. RULES CANNOT FULLY CAPTURE JUSTICE

As Justice Scalia famously put it, we think of "[t]he rule of law as a law of rules."¹⁶ Rules should be clear, general, stable, announced in advance, applied prospectively and consistently, and capable of being followed. A legal system that approaches this ideal, Lon Fuller argued, has its own internal morality.¹⁷ People can learn what the law requires of them and conform to it, and the legal system has to play by its own rules. In first-year criminal law courses, we often stress the principle of legality, the void-for-vagueness doctrine, the rule of lenity, and the ban on ex post facto laws.¹⁸ These doctrines serve a cluster of functions. In theory, they give citizens notice and fair warning of what conduct will expose them to punishment. But that justification is largely a fiction; few citizens sit around reading the precise terms of the latest criminal statutes. Instead, they rely on their own intuitive sense of justice as to what seems right and wrong and often assume that the law tracks their intuitions.

More realistically, legality doctrines are supposed to constrain official discretion. Police and prosecutors should not have free rein to decide what conduct to criminalize and how severely to punish it. Democratically elected legislatures can better reflect the public's sense of justice, sorting the most blameworthy and harmful acts from those that do not deserve punishment. Ultimately, the legality doctrines are about the separation of powers.¹⁹

First-year law students are tempted to find all kinds of criminal laws too vague. They soon learn, however, that courts do not require every criminal law to be as precise and narrowly tailored as possible, unless perhaps it intrudes on First Amendment freedoms.²⁰ Legislatures have great leeway to write broad laws and

16. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1175 (1989).

17. See LON L. FULLER, *THE MORALITY OF LAW* 42 (Yale U. Press 1964) (describing how the inner morality of the law demands that it be coherent and clear).

18. See U.S. CONST. art. I, § 9, cl. 3 (forbidding Congress to enact ex post facto laws); U.S. CONST. art. I, § 10, cl. 1 (applying same prohibition to states); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 156 (1972) (striking down vagrancy ordinance as unconstitutionally vague).

19. See John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 189 (1985) (describing how the principles of legality interact).

20. See David J. Bederman, Scott M. Christensen, & Scott Dean Quesenberry, *Of Banana Bills and Veggie Hate Crimes: The Constitutionality of Agricultural Disparagement Statutes*, 34 HARV. J. ON LEGIS. 135, 164 (1997) ("The Supreme Court of the United States has recognized that First Amendment protections of the freedom of speech are important and deserving of heightened protection.").

delegate enforcement discretion to police, judges, juries, parole boards, and especially prosecutors. Sometimes, they want to give prosecutors plea bargaining chips. Sometimes, they cannot be bothered to write their laws with care.

Enforcement leeway is most troubling when it lets prosecutors push the envelope and expand liability under vague statutes. Far more central to prosecutorial discretion, however, is the power to narrow liability by choosing not to enforce the law or seek the maximum penalty. Sometimes prosecutors simply lack enough evidence to produce a conviction at trial; at other times, they face a real risk of acquittal. In these cases, discretion is often the better part of valor, and a plea to a lesser charge is better than no conviction at all. In many other cases, prosecutors have a defendant dead to rights, but application of the law would not always seem just. Does a husband who kills his terminally ill wife after she begs him to do so deserve a first-degree murder conviction and life sentence? Does a mentally retarded teenager who uses a water pistol to stick up a convenience store deserve a standard sentence for armed robbery?

These kinds of cases are far from unimaginable, as the zero-tolerance examples in the Introduction demonstrate. These examples of law without discretion prove Mr. Bumble's complaint that "the law is a ass—a idiot [sic]," and Grant Gilmore's that "[i]n Hell there will be nothing but law, and due process will be meticulously observed."²¹ To many, the cure for discrimination would be worse than the disease. Mechanical rules without humanity grow inhuman and insane.

These cases illustrate that no criminal code can spell out crimes and punishments to fit every conceivable scenario. The most they can hope to do is to specify crimes and sentences for common, recurring cases and some of their permutations. A legislature or sentencing commission can reasonably anticipate the use of a weapon, or injury to victims, or the amount of money or drugs involved. Yet, whatever the legislature does not address, it implicitly delegates to prosecutors and other criminal justice actors.²² It is a kind of *Chevron* inquiry, allowing prosecutors reasonable leeway to implement legislative commands.²³ While in an ideal world, judges, juries, and pardon authorities would do more of the work to tailor charges and punishments, plenty of work would remain for prosecutors.

A technically guilty but morally sympathetic mentally retarded defendant should not have to endure prosecution in the first place for a nonviolent crime. No system of law can address these cases without some discretion at early stages to give the system needed flexibility. Furthermore, these hypothetical situations track the popular moral intuition that we generally want to pursue justice tempered by mercy. Individualized justice and mercy both require a human being, not a robot or guidelines manual, to review cases. Most cases deserve standard treatment, but exceptional cases deserve exceptions.

Discretion is bad only when it becomes idiosyncratic, unaccountable, or opaque. Prosecutorial discretion is on much firmer ground when it tracks widely

21. CHARLES DICKENS, *OLIVER TWIST* 354 (Kathleen Tillotson ed., Oxford U. Press 1966) (1838); GRANT GILMORE, *THE AGES OF AMERICAN LAW* 111 (Yale U. Press 1977).

22. See Stuntz, *supra* note 2, at 546-57 (describing the relationship between legislators and prosecutors in the context of prosecutorial discretion).

23. *Id.*

shared moral intuitions. These moral intuitions not only warn prospective criminals but also give prosecutors' decisions some democratic legitimacy. What is troubling about prosecutorial discretion is not that it places discretionary power in the hands of individuals. What is troubling is that it is very often ad hoc, hidden, and insulated from public scrutiny and criticism. Many discretionary decisions require no reasoned justification.²⁴ These decisions risk being inconsistent, biased, and tainted by agency costs that pull them far from the public's shared moral sense.

III. HOW TO IMPROVE PROSECUTORIAL DISCRETION

If we could bring these decisions out into the open, the public would be in a position to judge their fairness. Most head prosecutors are elected. To win re-election, they have strong incentives to track popular moral intuitions.²⁵ The first step, then, is to make discretion transparent. This would not mean opening every confidential file to public scrutiny, thereby violating defendants' and victims' privacy. But it does mean publishing better statistics about initial charges, final charges, recommended sentences, and reasons for charges, plea bargains, sentences, and related deals. Information technology can make these data more accessible to researchers and the public. For example, Marc Miller and Ronald Wright have mined the New Orleans District Attorney's Office data to summarize the reasons for prosecutorial declinations and charges.²⁶ They found patterns showing that most discretionary decisions follow a sort of office common law, that is, habits and patterns of disposition that treat like cases alike.²⁷ In other words, even though outside observers see only a black box with no evident law, insiders recognize norms and customs that yield predictable results.²⁸

Opening the black box can help to make prosecutors' decisions more legitimate in the eyes of the public as well as ferret out suspicious patterns that might reflect bias or sloth. Opening the black box would also invite more public input, helping to refine patterns of discretion to better track the public's shared sense of justice.²⁹ The shared sense of justice is contextual, so this process of refining discretion can make justice more reasoned and reasonable than any set of rules alone could.

Head prosecutors care about their reputations and often face re-election, so they will encourage line prosecutors to follow the public's shared sense of justice. An office-wide culture of guided discretion thus begins with head prosecutors, who lead by their rhetoric and by example. This comes into play in hiring, promotion,

24. See *id.* at 549 ("Criminal statutes are a grant of power to police and prosecutors, who can choose how aggressively and in what cases to exercise that power.").

25. *Id.* at 533.

26. Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 129 (2008).

27. See *id.* at 133-54 (describing and analyzing the reasons for prosecutorial decisions in the New Orleans District Attorney's Office).

28. See *id.* at 151-52 (noting that the likelihood of a prosecutor bringing charges directly tracks the seriousness of the given crime).

29. See *id.* at 181-96 (discussing the concept of transparency or the notion that the public should have greater access to reasons for prosecutorial decisions).

and firing, where supervisors can try to ferret out candidates who seem prone to going off on their own.³⁰ It should influence salary raises, bonuses, and incentives, rewarding consistency tempered by suitable mercy. Office-wide policies should try to summarize the norms for certain recurring types of cases and illustrations of exceptional cases. These policies could develop through a common-law accretion of precedent, so that newer attorneys could read the accumulated wisdom of their predecessors. Even if these policies were only advisory, they would serve as benchmarks and mental anchors, reining in outliers by making line prosecutors justify their decisions. Eventually, illustrations could develop into standards, and standards could develop into rules.³¹

In the academy, we have a strong judiciocentric bias. We assume that if a rule is not judicially enforceable, it is meaningless.³² Miller and Wright show, however, that internal prosecutorial norms can develop and consistently shape prosecutors' behavior without any judicial involvement.³³ The influence of office culture, backed up by the disciplining effect of voters' expectations, can give these norms and rules great power.³⁴

In other words, discretion is far from lawless or arbitrary. When used judiciously, it can deliver consistent and tailored results. What we need to watch out for in practice, then, are the forces that push prosecutorial discretion in the wrong direction, away from the public's sense of justice.

The most troubling forces working against justice are agency costs. The press of business pushes prosecutors to use their discretion to coerce pleas and threaten higher punishments for those who refuse to bargain. Even when the pressure of cases is not overwhelming, Milton Heumann argues, lawyers expect that cases should routinely plead out, and they use their leverage to push for pleas.³⁵ Far from being a concession to reality, prosecutorial discretion would probably work even better in an ideal world without entrenched habits of plea bargaining. Without the practical press of business, prosecutors would be freer to exercise discretion to suit justice. The trick, then, is not to abolish discretion but to counteract the agency costs that in practice drive a wedge between discretion and justice.

The best way to keep discretion from becoming idiosyncratic is to encourage prosecutors to develop patterns and habits and then justify deviations from those habits. Judges have some discretion, but they must justify their rulings with reasoned, written opinions subject to appellate review and public scrutiny. Prosecutors likewise should have to develop patterns that evolve into guidelines

30. See Stuntz, *supra* note 2, at 533 ("Like legislators, local prosecutors are likely to seek to produce the range of outcomes the public desires.").

31. Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 294 (1980).

32. See Jerry L. Mashaw, *Between Facts and Norms: Agency Statutory Interpretation as an Autonomous Enterprise*, 55 U. TORONTO L.J. 497, 500-01 (2005) (discussing the limitations of rules-focused academic legal interpretation).

33. See *supra* text accompanying notes 26-29 (discussing reasons for certain prosecutorial decisions).

34. See Stuntz, *supra* note 2, at 533 ("[Prosecutors'] incentive is to generate the level and distribution of prosecutions the public wants, subject to the resource constraints of their office.").

35. HEUMANN, *supra* note 1, at 117.

and policies. Line prosecutors might have to explain briefly in writing why they decided not to offer the usual plea bargain to a particular defendant. Supervisors could scrutinize these memos, question line prosecutors, and second guess them. Importantly, supervisors do not share line prosecutors' acute interests in disposing of their own workloads and avoiding even a chance of an embarrassing acquittal. Thus, they can correct for agency costs and keep line prosecutors in line. The mere fear of review would discipline outliers without preventing justifiable deviation. In other words, just decisions can and should bubble up from below, so long as higher-ups are there to review and harmonize them, to check for outliers.

Ultimately, even in an ideal world, discretion would exist and serve justice. The misguided quest for rules without discretion, most visible in mandatory-minimum sentences, misconceives justice. Justice is not some top-down scheme of perfectly filigreed rules, each with enough epicycles and perihelia to delight a Ptolemaic astronomer. Central planning, specified in advance, failed in Communist economies and fails in criminal justice. Justice has not only a deductive, top-down aspect but also an inductive, bottom-up one. From grassroots examples and comparisons across cases we recognize exceptions as well as patterns. Because justice necessarily has a case-by-case component, legislation must leave room for line officials' discretion in individual cases. In an ideal world, prosecutorial discretion would remain central to justice.